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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WILLIAM S. DOWNING, et al.,
Petitioners,

vs.

OAKLAND RAIDERS, LTD., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 9, 1984

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QUESTIONS PRESENTED

1. Whether the Court should define the unique relationship of professional sports leagues and the antitrust laws, and its effect on the rights of consumers to sue under such laws?

2. Whether a Sherman Act rule of reason analysis requires a balancing of the reasonableness of a restraint of trade in different local markets when more than one geographic market is impacted by the restraint?

3. Whether a professional sports league, such as the National Football League, is a single entity for purposes of internal league operations but a combination of separate entities for purposes of competition for local fan dollars in markets where more than one team competes?

4. Whether representations made to Congress by the National Football League and its member clubs were a condition for the antitrust immunity for the merger with the American Football League, and whether the breach of these representations raised factual issues for trial concerning whether the merger itself was subject to the antitrust laws?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are those named in the caption, and in addition include a class, as yet uncertified, of all season ticket holders for the home football games of the Oakland Raiders football club. Additional respondents not identified in the caption include Allen Davis, managing general partner of the Oakland Raiders, Ltd., National

Football League, an unincorporated association,* and the Los Angeles Memorial Coliseum Commission.

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*Respondents also include the member teams of the National Football League: Baltimore Football Club, Inc. (Baltimore Colts); Buffalo Bills, Inc.; Chargers Football Company (San Diego Chargers); Chicago Bears Football Club, Inc.; Cincinnati Bengals, Inc.; Cleveland Browns, Inc.; Dallas Cowboys Football Club, Inc.; The Detroit Lions, Inc.; The Five Smiths, Inc. (Atlanta Falcons); Green Bay Packers, Inc.; Houston Oilers, Inc.; Kansas City Chiefs Football Club, Inc.; Los Angeles Rams Football Company; Miami Dolphins, Ltd.; Minnesota Vikings Football Club, Inc.; New England Patriots Football Club; New Orleans Saints Louisiana Partnership; The New York Football Giants, Inc.; New York Jets Football Club, Inc.; Philadelphia Eagles Football Club, Inc.; Pittsburgh Steelers Sports, Inc.; Pro-Football, Inc. (Washington Redskins); Rocky Mountain Empire Sports, Inc. (Denver Broncos); St. Louis Football Cardinals Company; San Francisco Forty Niners; Seattle Professional Football (Seattle Seahawks); and Tampa Bay Area NFL Football, Inc. (Tampa Bay Buccaneers).

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OCTOBER TERM, 1983

WILLIAM S. DOWNING, et al.,
Petitioners,

vs.

OAKLAND RAIDERS, LTD., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner William S. Downing, on behalf of himself and all others similarly situated, respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Ninth Circuit entered on February 10, 1984.

JURISDICTION

The decision of the Court of Appeals was entered on June 21, 1983. A timely petition for rehearing with a suggestion for rehearing en banc was filed with the Court of Appeals, and was denied by order dated February 10, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

OPINIONS BELOW

The unreported memorandum opinion of the Court of Appeals affirming the District Court's grant of summary judgment for respondents, is reprinted as Appendix A hereto. The unreported order of the Court of Appeals denying both the petition for rehearing and suggestion for rehearing en banc, is reprinted as Appendix B hereto.

The District Court's unreported order granting respondents Oakland Raiders, Ltd. and Los Angeles Memorial Coliseum's joint motion for summary judgment and for dismissal, is reprinted as Appendix C hereto. The District Court's judgment entered pursuant to that order is reprinted as Appendix D hereto. The District Court's unreported order granting respondents National Football League's and member teams' motion for summary judgment and for dismissal, is reprinted as Appendix E hereto. The District Court's judgment entered pursuant to the latter order, is reprinted as Appendix F hereto.

STATUTORY PROVISIONS INVOLVED

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

3. The professional football antitrust exemption statute (15 U.S.C. § 1291) provides:

> "The antitrust laws, as defined in section 1 of the Act of October 15, 1914, as amended (38 Stat. 730), or in the Federal Trade Commission Act, as amended (38 Stat. 717), shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs. In addition, such laws shall not apply to a joint agreement by which the member clubs of two or more professional football leagues, which are exempt from income tax under section 501(c) (6) of Title 26, combine their operations in expanded single league so exempt from income tax, if such agreement increases rather than decreases the number of professional football clubs so operating, and the provisions of which are directly relevant thereto."

STATEMENT OF THE CASE

This case involves the rights of consumers of professional football to sue under the antitrust laws for economic injury they have suffered as a result of an agreement to eliminate professional sports competition in their local area. Plaintiffs were denied standing to assert their claims by the District Court's entry of summary judgment in favor of defendants only three months after this case was filed.

Plaintiff-petitioner William S. Downing represents a class, as yet uncertified, of season ticket holders to the Oakland Raiders' home games who are seeking damages and injunctive relief against the Oakland Raiders, Ltd. ("Raiders"), Los Angeles Memorial Coliseum Commission ("LAMCC") and the National Football League and its member teams ("NFL") in connection with an agreement to transfer the Raider franchise to Los Angeles. The complaint charges that such a move violates Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and constitutes a breach of defendants' contractual obligations to plaintiffs. (CR 1, filed March 6, 1980). At issue in this case is the elimination of commercial competition between the Oakland Raiders and the San Francisco 49ers ("49ers") in the Northern California Bay Area geographic market. An agreement to restrain trade involving the Raiders, LAMCC, the 49ers and others is charged as is misuse of the monopoly power of the NFL in the above market.

Plaintiffs' claims against defendants Raiders and LAMCC were dismissed on June 6, 1980, and plaintiffs' request for leave to conduct additional discovery and file an amended complaint were also denied. Plaintiffs at this date had taken three depositions—of Allen Davis (Raiders'

Managing General Partner), Pete Rozelle (Commissioner of the NFL) and George Glace (Raiders' Ticket Manager). The court invited further summary judgment motions from the remaining defendants and then granted these motions on September 19, 1980. The appeals to the Ninth Circuit resulting in this petition followed.

There is overwhelming evidence in the record that the Oakland Raiders and the San Francisco 49ers were direct head-to-head economic competitors for "sports fans'" dollars in the Northern California Bay Area market. Al Davis testified that there was aggressive "economic competition" between the 49ers and Raiders in the Northern California market. (Davis Depo. at 82). George Glace, the Raiders Ticket Manager, similarly testified that the Raiders "were competing with the San Francisco 49ers" for local ticket sales. (CR 40 at 59).

There is also no question that the Raiders entered into an agreement with the LAMCC pursuant to which the Raider franchise has now been relocated to Los Angeles. (CR 31 at 11; CR 66, Ex. 12). The NFL defendants have continued their agreement with the Raiders to jointly produce NFL football games, now at the Los Angeles Coliseum. The record below in addition contains substantial evidence, including the deposition testimony of petitioner Downing, that plaintiffs as purchasers of tickets to professional football games in the Northern California Bay Area have been injured by the elimination of competition between the Raiders and the 49ers. (CR 41).

At the time of the merger of the NFL and the old American Football League ("AFL"), the NFL defendants herein made specific representations to Congress concerning competition in the San Francisco Bay Area market in order

to secure antitrust immunity for the proposed merger. The grant of immunity is set forth in 15 U.S.C. § 1291. Mr. Rozelle, in his opening statement to Congress, declared that the proposed legislation would guarantee:

> "1. Professional football operations will be preserved in the 23 cities and 25 stadiums where such operations are presently being conducted. This alone is a matter of considerable public interest—to local economies, stadium authorities, and consumers."
> (CR 5, Ex. K at 32-33).

To accommodate this interest of consumers and secure the exemption sought from the federal antitrust laws, defendants expressly promised Congress and memorialized in Paragraph 2 to their Supplementary Merger Agreement the following:

> "No transfers of location of any present franchise of either the NFL or the AFL will be made as a result of the combining of the operations of the member clubs of two leagues in an expanded single league, specifically the New York Giants and the New York Jets will remain in New York City, *the San Francisco 49ers will remain in San Francisco, and the Oakland Raiders will remain in Oakland.*"
> (CR 1, Ex. "A") (emphasis added).

Thus, the NFL defendants including the Oakland Raiders secured an antitrust exemption for joint league operations between the old AFL (Raiders) and the NFL (49ers) based on an express representation to Congress for the benefit of plaintiffs which they now have breached.

The issues in this case are similar to those raised in *Los Angeles Memorial Coliseum, et al. v. National Football League, et al.*, 726 F.2d 1381 (9th Cir. 1984). A petition

for rehearing and suggestion for rehearing en banc is now pending in the Ninth Circuit in this related proceeding. The Ninth Circuit opinion in the above *Los Angeles Memorial Coliseum* case focuses on potential competition between the Raiders and the Los Angeles Rams in the Los Angeles geographic market. The NFL in its Ninth Circuit appeal in that case raised the issue of whether the trial court erred in not instructing the jury that it must balance the effect on competition in the San Francisco Bay Area market resulting from the Raiders' move, which is the central focus of this case, with the effect on competition in the Los Angeles market.

REASONS FOR GRANTING THE WRIT

A. The Rights of Consumers of Professional Sports To Sue Under The Antitrust Laws Is An Important Question Of Federal Law Which Should Be Decided By This Court

Numerous lower courts have struggled to define the appropriate relationship of the antitrust laws to the unique business of professional sports. Virtually all of the cases in this area have involved the rights of competitors, either individual teams or rival leagues, and suppliers of services or facilities, such as athletes or stadium owners, rather than the rights of consumers. *See, e.g., North American Soccer League v. National Football League,* 670 F.2d 1249 (2d Cir. 1982), *cert. denied,* ..... U.S. ....., 74 L.Ed.2d 639 (1982) (Challenge by soccer league to rule barring NFL members from having ownership interests in other professional sports clubs); *Mackey v. National Football League,* 543 F.2d 606 (8th Cir. 1976) (Challenge by an athlete to league rules governing player contracts); *Sports,*

Inc. v. U.S. Tennis Assoc., 665 F.2d 222 (8th Cir. 1981) (Suit by an equipment manufacturer to overturn rule barring use of particular tennis racquet); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) (Action by a potential entrant challenging the Washington Redskins' exclusive lease at RFK Stadium); *Mid-South Grizzlies v. National Football League*, 550 F.Supp. 558 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983) (Suit by an unsuccessful applicant seeking an NFL franchise).

The ultimate purpose of the federal antitrust laws, of course, is to promote competition so that consumers will enjoy the benefits of "lower prices" and "better goods and services". *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978). The Court in *Associated General Contractors v. California State Council of Carpenters*, ... U.S. ....., 74 L.Ed.2d 723 (1983) recently stressed in this regard:

> "As the legislative history shows, the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants in the relevant market."
> *Id.* at 738 (footnote omitted).

There is no question that consumers, such as plaintiffs herein, were intended to be the ultimate beneficiaries of this policy of competition. As such, consumers have standing to sue for direct economic injury suffered as a result of violations of the Sherman Act. The Court in *Blue Shield of Virginia v. McCready*, ... U.S. ....., 73 L.Ed.2d 149 (1982), held that a consumer of psychotherapeutic services could sue under Section 4 of the Clayton Act based on defendants' conspiracy in violation of the Sherman Act to

restrain competition in the market for such services. The Court emphasized that "McCready's injury [as a consumer] *was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.*" *Id.* at 163 (emphasis added).

There is absolutely no reason why sports fans who are direct local consumers of the relevant product, as was the plaintiff in *McCready,* should be denied standing to sue under the antitrust laws. Yet, the conclusory lower court opinions in this case are grounded on the erroneous proposition that "mere fans" cannot bring such suits. Professional sports leagues, obviously, are of tremendous social and economic importance today in our society. This Court should clarify that fans as direct purchasers of the product of local professional sports teams have standing to bring antitrust actions involving the anticompetitive conduct of local professional sports teams.

Plaintiffs here, as noted above, submitted substantial evidence to the District Court concerning the existence and nature of competition in the San Francisco Bay Area market for plaintiffs' fan dollars between the Raiders and the 49ers. Similarly, plaintiffs submitted evidence that the Raiders agreed with the LAMCC and other defendants to move the franchise to Los Angeles. Substantial evidence was also presented that this agreement eliminated the above local competition, and directly injured plaintiffs' economic interests.[1]

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[1]The Ninth Circuit in finding no factual basis for plaintiffs' conspiracy claims against the NFL apparently was relying on the fact that the NFL ostensibly was opposing the Raiders' move at the time in the above *Los Angeles Memorial Coliseum* case. It does not follow from this fact, however, that a combination under Section 1

B. It Has Never Been Determined Whether a Sherman Act Rule of Reason Analysis Requires a Balancing of the Reasonableness of a Restraint of Trade in All Relevant Local Markets Impacted by the Restraint

It is an important unresolved question of federal law whether a single restraint, here an agreement to move the Raider franchise to Los Angeles, which directly impacts upon competition in two distinct local markets must be evaluated under the rule of reason by balancing the pro-competitive and anticompetitive effects in the respective geographic markets. See discussion of the rule of reason in *National Society of Professional Engineers v. United States,* 435 U.S. 679, 687-691 (1978), and *Chicago Board of Trade v. United States,* 246 U.S. 231, 238 (1918).

This is the appropriate analysis for "product" markets in the context of antitrust vertical restraints where the procompetitive effect of the restraint in the market for "interbrand" product competition is balanced against the anticompetitive effect of the restraint in the market for "intrabrand" product competition. *Continental TV v. GTE Sylvania,* 433 U.S. 36, 51-54 (1977). Petitioner submits that this same analysis should apply where different geographic markets are affected by a single restraint which is relevant to a particular plaintiff's claims. See relevant market discussion in *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 330-332 (1961), and *White and White v. American Hospital Supply,* 723 F.2d 495, 500-504 (6th Cir. 1983).

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of the Sherman Act does not exist. The Raiders could not play in Los Angeles or elsewhere without agreement from the other NFL teams on scheduling, the player draft and other matters. The extent to which the NFL's participation in the restraint is involuntary is irrelevant for purposes of the Section 1 combination requirement. *Albrecht v. The Herald Co.,* 390 U.S. 145, 149 (1968).

This principle is often confused and has never been clearly articulated. In the *Los Angeles Memorial Coliseum* case, the Raiders successfully argued in their Ninth Circuit brief that the challenged retraint on competition for local fan dollars should be evaluated *only* in the Los Angeles geographic market:

> "Had the Raiders been allowed to be in Los Angeles, competition would have been 'tremendous' and 'head-to-head' for players, coaches, fans, ticket sales [citations omitted]. Keeping the Raiders from Los Angeles shielded the Rams from competition. Each of the other clubowners lined up to enlist the others to protect it from the same danger of competition when and if its time of peril should come."
>
> Raiders' *Los Angeles Memorial Coliseum Commission* Brief at 15-16.

The panels of the Ninth Circuit in the instant case and in *Los Angeles Memorial Coliseum, supra,* 726 F.2d at 1392-1394, ignored this seminal principle and failed to balance the anticompetitive effects of the challenged restraint in the San Francisco area market with any procompetitive effects in the Los Angeles market.

C. This Court Should Decide The Circumstances Under Which A Professional Sports League Is A Single Entity For Purposes Of The Antitrust Laws

One of the principal issues in this case, and in any action involving a professional sports league, is the extent to which the league's members are considered a single entity for purposes of the combination requirement of Section 1 of the Sherman Act. *See North American Soccer League, supra,* 670 F.2d at 1257-1259; *San Francisco Seals, Ltd. v.*

National Hockey League, 379 F.Supp. 966, 969-970 (C.D. Cal. 1974).

The single entity issue is not an all or nothing proposition. *But see Los Angeles Memorial Coliseum, supra*, 726 F.2d at 1387-1390. It is true that NFL members jointly produce a single product, NFL football, and therefore must be viewed as a single entity for some purposes in order to achieve the legitimate objectives of the league. The NFL's internal operations, for example, for the most part appropriately qualify as those of a single entity. An internal NFL agreement on the structure and running of the league office though is fundamentally different from an agreement by local teams to eliminate commercial competition.

The touchstone in a particular case should be whether the joint actions are essential to legitimate league functions necessary for the existence of the league. The league members obviously must agree on playing rules and division structure, for example, or there can be no league. The essence of the league is organized competition on the playing field and the necessary and ancillary agreements thereto. But suppressing commercial competition for sports fans' dollars in a local area is in no way necessary to the functioning of the league and, further, is inconsistent with consumers' fundamental "economic freedom" as guaranteed by the antitrust laws. *United States v. Topco Associates*, 405 U.S. 596, 610 (1972).

This Court should resolve the standards to be applied in a particular case for deciding which functions of a professional sports league are subject to the conspiracy element of Section 1 of the Sherman Act and which are not. Plaintiffs in the instant case are entitled to a hearing

on the ability of NFL members to conspire for purposes of eliminating commercial competition between the Raiders and 49ers in the San Francisco Bay Area market.

D. Petitioner Has Standing to Bring an Antitrust Action Against Defendants for Unlawful Conspiracy Arising from Their Merger Agreement

The Court of Appeals affirmed dismissal of petitioner's action in part because:

> "No genuine issue of triable fact was tendered in support of appellant's third-party beneficiary claim that the Raiders' move to Los Angeles violated an express or implied condition of Congress' consent to the merger of NFL with the American Football League. *Even if any such condition existed and was breached, no implied right of action accrued* in plaintiff's favor." See *Cort v. Ash,* 422 U.S. 66 (1975). (Appendix A, p. 2) (emphasis added)[2]

The issue is whether plaintiffs, who represent consumers of Bay Area professional football, have standing to assert that defendants' breach of representations to Congress about preserving local competition in the Bay Area invalidate professional football's limited antitrust immunity in connection with the merger of the two leagues, the NFL and the AFL.

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[2]The Court of Appeals also ruled that petitioner presented insufficient evidence to create a genuine issue of fact that the Raiders' move to Los Angeles violated a condition of Congress' consent to the antitrust merger, and amounted to an abuse of monopoly power. This ruling though ignores the substantial evidence petitioner submitted which indicates that the antitrust immunity afforded by 15 U.S.C. § 1291 was indeed conditioned upon a status quo of the franchises as of 1966. *See* Statement of the Case, *supra.*

The decision in *Cort v. Ash*, 422 U.S. 66 (1975) does not bar petitioner's claim. That case rejected an implied civil cause of action asserted under a federal criminal statute because the statute gave "absolutely no indication that civil enforcement of any kind was available to anyone." *Id.* 422 U.S. 80.

Plaintiffs' claim here is not implied, it is premised upon the federal antitrust laws. The complaint asserts that defendants' assurances to Congress that the Raiders would remain in Oakland was a condition of the limited antitrust immunity granted by Congress, and since this condition was breached, the merger between the AFL (Raiders) and NFL (49ers) now is subject to normal antitrust scrutiny. *Cort v. Ash, supra,* has nothing to do with such a claim. This claim is designed simply to test whether respondents' antitrust immunity is still valid. See *Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982); *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976).

Antitrust immunity of course is generally disfavored because of the "fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973). Claims of antitrust immunity thus should be strictly construed. *Abbott Laboratories v. Portland Retail Druggists Association, Inc.,* 425 U.S. 1, 11-12 (1976); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787 (1975).

Antitrust immunity conferred by statute, like that afforded the AFL (Raiders) and NFL (49ers) merger by 15 U.S.C. §1291, should be forfeited as a matter of public policy when it is based upon express assurances and conditions which later are fundamentally changed. Defendants

should not continue to benefit from an immunity secured on the condition that local competition between the San Francisco 49ers and the Oakland Raiders would be preserved, when they have conspired to breach that condition. These changed circumstances justify at least a hearing concerning the merits of plaintiffs' underlying antitrust claim based on the merger of the two leagues.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Ninth Circuit insofar as it affirmed the District Court's orders granting summary judgment for respondents.

DATED: May 9, 1984

Respectfully submitted,

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(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Nos. 80-4382
80-4513

William Downing, on behalf of himself
and all persons similarly situated,
Plaintiffs-Appellants,

vs.

Oakland Raiders, Ltd., a partnership;
Los Angeles Memorial Coliseum Commission,
an unincorporated association; and,
National Football League,
an unincorporated association,
Defendants-Appellees.

[Filed June 21, 1983]

MEMORANDUM

Argued and Submitted—January 13, 1982

Appeal from the United States District Court
for the Northern District of California

Honorable Robert H. Schnacke, District Judge, Presiding

Before: FLETCHER, POOLE and CANBY,
Circuit Judges.

The district court granted summary judgment against appellant in his antitrust class action suit filed on behalf of holders of season tickets for Oakland Raiders, Ltd. (Raiders) football games. We affirm because none of the papers on file showed the existence of a genuine issue as to any material fact, and the defendants were entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

No factual basis supported the claim that the National Football League (NFL) conspired or acquiesced in the Raiders' planned move to Los Angeles, or that any of the defendants monopolized, attempted to monopolize, or abused monopoly power with respect to the Raiders' move to Los Angeles.

No genuine issue of triable fact was tendered in support of appellant's third-party beneficiary claim that the Raiders' move to Los Angeles violated an express or implied condition of Congress' consent to the merger of NFL with the American Football League. Even if any such condition existed and was breached, no implied right of action accrued in plaintiff's favor. *See Cort v. Ash*, 422 U.S. 66 (1975).

Appellant abandoned or failed to present any genuine issue of triable fact with respect to his abuse of monopoly power claim that the Raiders' move to Los Angeles violated an express or implied condition of Congress' consent to the merger or NFL with the American Football League.

Appellant neither raised in pleadings nor supported by proof his contention, made for the first time on appeal, that the alleged consent of the defendants to the Raiders' move to Los Angeles was an attempt to allocate geographic

territories among economic competitors, and hence constituted a per se violation of the Sherman Act.

The district court did not abuse its discretion in refusing to grant additional time to appellant for discovery since the facts sought to be explored were either irrelevant or concerned with issues not properly raised in the district court.

AFFIRMED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

Nos. 80-4382
80-4513

William Downing, on behalf of himself
and all persons similarly situated,
Plaintiffs-Appellants,

vs.

Oakland Raiders, Ltd., a partnership;
Los Angeles Memorial Coliseum Commission,
an unincorporated association; and
National Football League,
an unincorporated association,
Defendants-Appellees.

[Filed Feb. 10, 1984]

ORDER

Before: FLETCHER, POOLE and CANBY, Circuit Judges.

The panel as constituted in the above case has unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion. Fed. R. App. P. 35(b).

The panel as constituted in the above case has also voted to reject the alternative motion for a stay of the effective date of the Memorandum Decision.

The petition for rehearing and the alternative motion for a stay are denied and the suggestion for rehearing en banc is rejected.

Appendix C

United States District Court
For the Northern District of California

No. C-80-0681 RHS

William S. Downing, on behalf of himself
and all persons similarly situated,
Plaintiffs,

vs.

Oakland Raiders, Ltd.,
a partnership, et al.,
Defendants.

[Filed June 24, 1980]

Order Granting the Motions of Defendants Los Angeles Memorial Coliseum and Oakland Raiders For Summary Judgment and Dismissal

The motions of defendants Los Angeles Memorial Coliseum Commission and Oakland Raiders (sued herein under the name of Oakland Raiders, Ltd.) for summary judgment and dismissal having duly come on for hearing, and good cause appearing therefor,

It Is Hereby Ordered and Adjudged as follows:

1. Said motions shall be and the same are hereby granted.

2. For all the reasons set forth in the briefs and supporting papers of the moving defendants, the claims of plaintiffs under Sections 1 and 2 of The Sherman Act (15 U.S.C. §§ 1, 2) are hereby dismissed as against defendants Los Angeles Memorial Coliseum Commission, Oak-

land Raiders, with prejudice, and as to defendant Allen W. Davis, without prejudice.

3. Pendent jurisdiction will not be exercised over the remaining causes of action or claims for relief sought to be alleged in the complaint, and the remaining causes of action or claims are hereby dismissed without prejudice as against the defendants Los Angeles Memorial Coliseum Commission, Oakland Raiders, and Allen W. Davis, with costs to each of said defendants to be taxed according to law.

4. Plaintiffs' request for further discovery with respect to the motions of said defendants is denied.

5. Plaintiffs' request for leave to file an amended complaint is denied.

6. The Court expressly determines, under F.R.Civ.P. Rule 54(b), that there is no just reason for delay and expressly directs the entry of final judgment of dismissal as against defendants Los Angeles Memorial Coliseum Commission, Oakland Raiders, and Allen W. Davis.

Dated: June 24, 1980

/s/ Robert H. Schnacke
United States
District Judge

Approved as to form pursuant to Local Rule 220-12:

/s/ Stephen C. Theoharis
Attorneys for Plaintiff

/s/ Warren E. George
Attorneys for
defendant National
Football League, et al.

Not approved as to form.

/s/ R. Stuart Baird
Attorneys for
Oakland Raiders and
Allen Davis

Appendix D

In the United States District Court
For the Northern District of California

C-80-681 RHS

William Downing, on behalf of himself
and all persons similarly situated,
Plaintiffs,

vs.

Oakland Raiders, Ltd., a partnership, et al.,
Defendants.

[Filed June 24, 1980]

JUDGMENT

In accordance with the "Order granting the motions of defendants Los Angeles Memorial Coliseum and Oakland Raiders for summary judgment and dismissal," it is hereby adjudged that:

(a) Plaintiffs' 15 U.S.C. §§ 1, 2, claims are dismissed with prejudice, as to defendants Los Angeles Memorial Coliseum Commission (hereinafter, "LAMCC") and Oakland Raiders, and are dismissed without prejudice, as to defendant Allen Davis.

(b) Plaintiffs' other claims are dismissed without prejudice, as to defendants LAMCC, Oakland Raiders, and Allen Davis.

(c) Defendants LAMCC, Oakland Raiders, and Allen Davis shall recover their costs of action from plaintiffs.

Dated: June 20, 1980

/s/ Robert H. Schnacke
United States District Judge

Appendix E

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United States District Court
Northern District of California

No. C-80-0681 RHS

William S. Downing, on behalf of himself
and all persons similarly situated,
Plaintiffs,

vs.

Oakland Raiders, Ltd., a partnership; et al.,
Defendants.

[Filed Sept. 30, 1980]

Order Granting the Motion of Defendants The National Football League For Summary Judgment and Dismissal and Denying Plaintiffs Counter Motion For Leave to File First Amended Complaint

The motion of The National Football League ("NFL") defendants (with the exception of The Oakland Raiders) for summary judgment and dismissal and the counter motion of plaintiffs for leave to file a first amended complaint having duly come on for hearing, and good cause appearing therefor,

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The motion of the NFL defendants shall be and the same is hereby granted.

2. For all the reasons set forth in the briefs and supporting papers of the moving defendants, the claims of plaintiffs under Sections 1 and 2 of The Sherman Act (15 U.S.C. §§1, 2) are hereby dismissed as against the NFL defendants (with the exception of the Oakland Raiders), with prejudice.

3. Plaintiffs' request for further discovery with respect to the motions of said defendants is denied.

4. Plaintiffs counter motion for leave to file a first amended complaint is denied.

5. The Court expressly determines, under F.R.Civ.P. Rule 54(b), that there is no just reason for delay and expressly directs the entry of final judgment of dismissal as against the NFL defendants.

DATED: September 30, 1980

/s/ Robert H. Schnacke
United States District Judge

APPROVED AS TO FORM PURSUANT
TO LOCAL RULE 220-12:

/s/ Stephen C. Theoharis
Attorneys for plaintiff

/s/ M. Holly Haugh
Attorneys for defendant
National Football League, et al.

Appendix F

United States District Court
Northern District of California

No. C-80-0681 RHS

William S. Downing, on behalf of himself
and all persons similarly situated,
Plaintiffs,

vs.

Oakland Raiders, Ltd., a partnership; et al.,
Defendants.

[Filed Sept. 30, 1980]

JUDGMENT

In accordance with the "Order Granting the Motion of Defendants The National Football League for Summary Judgment and Dismissal and Denying Plaintiffs Counter Motion for Leave to File First Amended Complaint" it is hereby adjudged that:

(a) Plaintiffs' 15 U.S.C. §§ 1, 2, claims are dismissed with prejudice as to The National Football League defendants (with the exception of The Oakland Raiders).

(b) Plaintiffs' other claims are dismissed without prejudice, as to the defendants.

(c) The NFL Defendants shall recover their costs of action from plaintiffs.

DATED: September 30, 1980

/s/ Robert H. Schnacke

Robert H. Schnacke
United States District Judge

No. 83-1844

Office - Supreme Court, U.S.
FILED
JUN 8 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court

OF THE

United States

WILLIAM S. DOWNING, et al.,
Petitioners,

vs.

OAKLAND RAIDERS, LTD., et al.,
Respondents.

BRIEF OF RESPONDENTS LOS ANGELES RAIDERS (formerly Oakland Raiders) and LOS ANGELES MEMORIAL COLISEUM COMMISSION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 83-1844

In the Supreme Court

OF THE

United States

WILLIAM S. DOWNING, et al.,
Petitioners,

vs.

OAKLAND RAIDERS, LTD., et al.,
Respondents.

BRIEF OF RESPONDENTS LOS ANGELES RAIDERS (formerly Oakland Raiders) and LOS ANGELES MEMORIAL COLISEUM COMMISSION[1] IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner has carpentered a series of "questions", conceived to be enticing, which have nothing to do with this case and are not presented.

In early 1980, Oakland Raiders ("Raiders"), a member of the National Football League ("NFL"), decided to move to Los Angeles from Oakland, California, and was prevented from doing so by NFL's refusal to schedule Raiders' home games in Los Angeles. Litigation raged between the Raiders and the Los Angeles Memorial Coliseum Com-

[1]Los Angeles Memorial Coliseum Commission is a Joint Powers Agency of the City of Los Angeles, the County of Los Angeles, and the State of California, under California Government Code, Title I, Div. 7, Ch. 5.

mission, on the one hand, and NFL and its members (other than the Raiders) on the other, in which NFL and its members were charged by Raiders and the Coliseum Commission with conspiring to *prevent* the Raiders from *moving to Los Angeles from Oakland,* in violation of Section 1 of the Sherman Act. In due course it was so adjudicated in the District Court for the Central District of California, and the judgment was affirmed in *Los Angeles Memorial Coliseum v. National Football League,* 726 F.2d 1381 (9 Cir. Feb. 1984).

But in March, 1980, petitioner Downing, as an Oakland fan and season ticket-holder, filed this suit against the Raiders, the Los Angeles Memorial Coliseum Commission, the NFL and all its member clubs, charging, believe it or not, that NFL and its clubs, including the Raiders, were conspiring to move the Raiders to Los Angeles from Oakland!

The district court dismissed the case for the reason, *inter alia,* that there was not the slightest evidence of any conspiracy between the Raiders and the NFL and its other clubs to move the Raiders to Los Angeles from Oakland. That truth is obvious from the fact that bitter litigation was proceeding between Raiders on the one hand, and NFL and its other members on the other, in which the reverse was charged and ultimately adjudicated, that NFL and its members were conspiring to *keep Raiders* in Oakland and *out of Los Angeles.* In affirming that judgment, the Ninth Circuit Court of Appeals did so on the basis, among others, that there was no evidence whatsoever of the charged conspiracy (App. A to Petition at A-2). Under the two-court rule this Court accepts as a fact that there

is no such conspiracy as charged by petitioner. *Rogers v. Lodge,* 458 U.S. 613, 623 (1982).

By his Question No. 1, petitioner asks the Court to discuss the relationship of professional sports leagues to the antitrust laws. That might be the subject of a legal essay in a law review or a titillating one in "Sports Illustrated", but no case or controversy involved in the present proceedings presents it.

Petitioner's second purported question asks the Court to discuss the relationship of one market to another, but no conspiracy has been charged which requires any such essay.

Petitioner next asks the Court to consider whether the National Football League is a single entity. In a case where that issue *was* presented *(North American Soccer League v. National Football League,* 670 F.2d 1249 (2 Cir. 1982)), the Court denied certiorari, 459 U.S. 1074. The question is not present here. Regardless of whether NFL is an entity or consists of 28 different entities, there still is no evidence that it, either as an entity or as an aggregate of entities, conspired as charged.

Petitioner's last proffered question rests on a supposition that when NFL in 1966 obtained an amendment to the antitrust laws granting exemption for the merger of the National Football League and the American Football League, "representation" was made to Congress that the Raiders would remain in Oakland forever. The question petitioner proffers is whether the exemption from the antitrust laws granted by Congress to a merger of the two leagues has been lost. But no question whether the merger of NFL and the old AFL is now illegal is presented in this case. The claim in this case is that there was conspiracy

to *move* the Raiders out of Oakland. And there is no evidence of any such conspiracy.[2]

CONCLUSION

We respectfully submit that the petition should be denied.

Dated: San Francisco, California, June 6, 1984

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By MOSES LASKY

---

[2]Actually, the factual basis of the supposed question does not exist. The "representation", as quoted in the petition (at p. 6), consists of a statement by a witness in hearings on the bill as being that

> "[n]o transfers of location of any present franchise of either the NFL or the AFL will be made *as a result of the combining of the operations of the member clubs of two leagues* in an expanded single league, specifically the New York Giants and the New York Jets will remain in New York City, the San Francisco 49ers will remain in San Francisco, and the Oakland Raiders will remain in Oakland." [italics added]

That was a statement that no transfer of location would be made as a result of the merger. None was. The merger agreement was in 1966. Transfer of the Raiders to Los Angeles fourteen (14) years later was not a result of the merger.

Office-Supreme Court, U.S.
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CLERK

No. 83-1844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM S. DOWNING,
Petitioner,

v.

OAKLAND RAIDERS, LTD., *et al.*,
Respondents.

BRIEF OF RESPONDENTS NATIONAL FOOTBALL LEAGUE, *ET AL.*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the unilateral relocation of the Oakland Raiders' NFL franchise from Oakland, California to Los Angeles, California, in violation of the NFL Constitution and By-Laws and over the unanimous opposition of the NFL Executive Committee, states a claim against the NFL and its member clubs under Section 1 or 2 of the Sherman Act. [1]

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[1] This brief is submitted on behalf of the NFL and all NFL member clubs, except the Oakland Raiders, Ltd.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1844

WILLIAM S. DOWNING,
Petitioner,

v.

OAKLAND RAIDERS, LTD., *et al.*,
Respondents.

BRIEF OF RESPONDENTS NATIONAL FOOTBALL LEAGUE, *ET AL.*, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE CASE

The Oakland Raiders ("Raiders") club of the NFL was an early member club of the American Football League ("AFL"), and commenced operations in Oakland, California in 1960. The decision to conduct AFL operations in Oakland was made jointly by the remaining AFL clubs, all of which contributed portions of their own assets to create the Raiders. The Raiders thereafter shared with the other AFL clubs the economic risks and rewards of that league's coproduction, comarketing, and revenue-sharing activities.

In 1966, the NFL and AFL agreed in principle to a plan under which the two leagues would consolidate their operations into an expanded single league, and each of the then-existing AFL member clubs, including the Oakland Raiders, would receive franchises in the NFL. That plan was approved by Congress in that same year. 15 U.S.C. § 1291 (1982). The expanded single league commenced operations in February, 1970.

A formal agreement for effecting the NFL-AFL consolidation was executed by all member clubs of both leagues. That agreement provided that all clubs of both leagues would remain in their home communities, including the Raiders in Oakland, until and unless the NFL Executive Committee determined otherwise. Pursuant to that agreement, the Raiders continued to present NFL football in Oakland as an NFL member club through the 1979 playing season.

In January, 1980, the Raiders decided to relocate to Los Angeles and present NFL football at the Los Angeles Memorial Coliseum ("Coliseum"). The NFL Constitution and By-Laws required that such transfers be approved by the affirmative vote of three-fourths of the member clubs of the League.

The Raiders refused to submit their proposal to the League for evaluation and approval, and on March 1, 1980, announced their intention to operate as the NFL's Los Angeles franchise, beginning with the 1980 playing season. The NFL made an independent investigation of the proposed transfer and shortly thereafter, the NFL Executive Committee, without dissent, voted not to approve the Raiders' transfer. The League then secured a preliminary injunction prohibiting the Raiders from operating outside Oakland until the League determined otherwise. NFL Commissioner Rozelle further stated that no Raiders' games would be scheduled in Los Angeles.[1] In June, 1980, the Raiders joined in an already pending action brought by the Coliseum against the NFL, with both plaintiffs alleging that the League's refusal to approve the Raiders' transfer was a violation of Section 1 of the Sherman Act.

An initial trial of that action in 1981 resulted in a hung jury and a mistrial. In 1982, judgment was entered on a jury verdict in favor of the Raiders and the Coliseum and was subsequently affirmed by a divided panel of the Ninth Circuit Court of Appeals. *Los Angeles Memorial Coliseum Commission* v. *National Football League*, 726 F.2d 1381 (9th Cir. 1984). On

[1] Independently, the City of Oakland filed an eminent domain suit against the Raiders and secured an injunction barring the transfer. *See* City of Oakland v. Oakland Raiders, 32 Cal.3d 60, 183 Cal. Rptr. 673 (1982).

June 19, 1984, petitions for rehearing and suggestions for rehearing *en banc* in that case were denied. A separate trial on damages in 1983 resulted in judgments in favor of the plaintiffs totalling approximately $50 million. Those judgments are presently the subject of appeals to the Ninth Circuit.

Petitioner is an Oakland fan. His claims arise out of the Raiders' unilateral relocation to Los Angeles, which petitioner alleges was actually the result of a conspiracy among the Raiders, the Coliseum, and the NFL. The action against the Raiders and the Coliseum was dismissed on June 24, 1980. Pet. A-6-8. A separate judgment was entered in favor of the NFL on September 30, 1980. Pet. A-9-11. Both judgments were affirmed by a unanimous Court of Appeals on June 21, 1983. Pet. A-1-3.

In short, petitioner's claims rest on the incredible contention that the NFL, which now faces the prospect of paying a heavy and punitive damage judgment for attempting to maintain the Raiders in Oakland, actually *conspired* with the Raiders and the Coliseum to bring about the Raiders' relocation to Los Angeles. This contention, already rejected by both the District Court and a unanimous Court of Appeals, does not merit further review by this Court.

REASONS FOR DENYING THE WRIT

The Raiders' unilateral relocation to Los Angeles, and the Ninth Circuit's treatment of the antitrust and public interest questions raised in the *Los Angeles Coliseum* case, present important issues deserving of consideration by this Court. In due course, the NFL will petition this Court to issue a writ of certiorari to the Ninth Circuit in that case. *This* case, however, is an inadequate vehicle for posing those issues and petitioner lacks standing to present them. Further, as it applies to the NFL, this case is based on a factual premise that is demonstrably false.

The Ninth Circuit found that "[n]o factual basis supported the claim that the National Football League ("NFL") conspired or acquiesced in the Raiders' planned move to Los Angeles . . . ." Pet. A-2. The District Court made a similar

determination. Pet. A-9-10. Nothing in the record below or in any other court proceedings would or could support a contrary holding. Absent a finding of a conspiracy between the NFL and the Raiders or the Coliseum, plaintiff's antitrust claims against the NFL must fail.

The questions set forth in the petition, particularly those relating to market definition and the nature of professional sports leagues should, we submit, be addressed by this Court in an appropriate case. None of these issues, however, is presented in this case. Petitioner's invocation of the Act of Congress approving the merger of the NFL and the AFL (15 U.S.C. § 1291) is also misplaced. The Court of Appeals correctly held that the 1966 statute contained no broad grant of standing for consumers of sports entertainment to undertake its enforcement.

CONCLUSION

Both the District Court and the Court of Appeals correctly held that no triable issue of fact was presented by the claim that the NFL conspired to move the Raiders. *See First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 624 (9th Cir. 1977). The petition sets forth no grounds for questioning that conclusion. The petition should be denied.

Respectfully submitted,

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July 9, 1984